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11 File # 10-007797

12
13 **UNITED STATES DISTRICT COURT**
14 **FOR THE DISTRICT OF ARIZONA**
15 **TUCSON DIVISION**
16

17 **FEDERAL NATIONAL MORTGAGE**
18 **ASSOCIATION, its assignees and/ or**
19 **successors-in-interest,**

20 **Plaintiff,**

21 **v.**

22 **James Kelder, Marshall Home and**
23 **Elizabeth Kelder, Occupants and Parties-In**
24 **Possession,**

on their own behalf and on behalf of all
others similarly situated.

Defendant(s).

Case No. 11-81 TUC FRZ

Maricopa County Superior Case No.
CV2011-00559

MOTION TO REMAND

Federal National Mortgage Association, (herein after "FNMA") by and through
counsel undersigned, hereby submits its Motion to Remand. As established below, the
Court should remand this case to the superior court, because Defendants' Notice of
Removal is untimely and improper and because this Court lacks jurisdiction. This Motion
is based upon the following Memorandum of Points and Authorities attached hereto.

///

1 DATED this 3rd day of May, 2011.

2
3 /s/ Kristin E. Mathers

4 Jason P. Sherman

Kristin E. Mathers

5 Attorneys for Plaintiff

6 **MEMORANDUM OF POINTS AND AUTHORITIES**

7 **I. INTRODUCTION**

8 On or about November 8, 2007, Defendants James and Elizabeth Kelder
9 (“Kelder”) executed a note secured by a deed securing real property known as 6207 E.
10 Winchomb Drive, Scottsdale, Arizona 85254 (“the Property”). Defendants defaulted by
11 failing to make monthly installment payments due Plaintiff.

12 The successor trustee initiated Trustee’s Sale proceedings on the Property on June
13 30, 2009 by recording a Notice of Trustee’s Sale. The then-current beneficiary of the
14 deed of trust was the successful purchaser of the Property at the Trustee’s Sale held
15 December 13, 2010 for its high bid in the amount of \$332,210.67. The Trustee deeded
16 the property and a copy of the Trustee’s Deed is attached to Plaintiff’s complaint. The
17 purchaser of the property executed a Special Warranty Deed restoring title of the
18 Property to Plaintiff.

19
20 On January 5, 2011, Plaintiff filed a Forcible Entry and Detainer action (the “FED
21 Action”). On January 8, 2011 Plaintiff personally served Defendants with a copy of the
22 complaint and summons. A copy of the service affidavit is attached hereto as Exhibit A.
23 On January 20, 2011 the Defendants filed a Notice of Change of Judge. On January 24,
24 2011, the FED Action was reassigned to Commissioner Michael Barth for all further

1 proceedings. On February 15, 2011, during the initial appearance, Defendants pled not
2 guilty and the matter was set for trial. On February 17, 2011, the Defendants filed a
3 Notice of Removal to an already pending District of Arizona-Tucson Division case,
4 number 11-81 TUC FRZ.¹ The FED Action has been placed on the inactive calendar
5 pending a remand or dismissal order.

6 As established below, this action is not removable because, Defendant's removal
7 is improper and untimely, and this Court lacks jurisdiction over a state court forcible
8 detainer action.

9 **II. LEGAL ANALYSIS**

10 **A. Defendant's Notice of Removal is Improper and Untimely.**

11 Defendant, without any legal basis whatsoever removed the FED Action to an
12 already pending US District Court case. On that ground alone the Court should dismiss
13 or remand.

14 28 U.S.C. § 1446 outlines the procedures for removal. Section 1446(b) requires a
15 Defendant to file a notice of removal within 30 days after receipt of the complaint or 30
16 days after service of the summons, whichever is shorter. In this case, Kelder was served
17 with the initial complaint in the FED Action on January 8, 2011. Forty days later, Kelder
18 and Marshall Home ("Defendants") filed their Notice of Removal. Defendants missed
19 the statutory deadline to remove this case. It follows that this case is not removable and
20 this case should be remanded.

21 **B. The District Court Lacks Subject Matter Jurisdiction**

22
23
24 ¹ James Kelder and Marshall Home are the only parties who signed the Notice of Removal. Upon
information and belief Marshall Home is not an occupant or party in possession of the Property and thus
is not a proper party to this action.

1 The Court should equally deny or remand this case, because this Court lacks
2 subject matter jurisdiction. It is well established law that removal of a state court claim
3 to federal court, not based on diversity or specific statutory authority, is permitted only
4 where the underlying claim itself could have originally been brought in the federal court.
5 In other words, the federal court must have had potential original jurisdiction over the
6 initial claim filed by the Plaintiff. In determining whether the federal court has original
7 jurisdiction, the Plaintiff's statement in his or her complaint must establish the federal
8 jurisdiction. Louisville & Nashville Railroad Co. v. Mottley, 211 U.S. 149, 152, 29 S.Ct.
9 42, 43 (1908). In the above case, the Court held that:

11 It is the settled interpretation of these words, as used in this
12 statute, conferring jurisdiction, that suit arises under the
13 Constitution and laws of the United States only when the
14 plaintiff's statement of his own cause of action shows that it
is based upon those laws or that Constitution.
(Emphasis added).

15 Based on the Louisville case, federal courts have adopted the "well pleaded
16 complaint" rule. Under that rule, in order to establish federal jurisdiction, "the plaintiff's
17 complaint must contain a claim 'arising under' federal law, and a defendant may not
18 invoke removal jurisdiction simply by asserting a federal defense." Clinton v. Acequia,
19 94 F.3d 568, 570 (9th Circ. 1996). Furthermore, "neither the defendant's answer nor its
20 petition for removal may serve as the basis for federal jurisdiction..." Powers v. South
21 Central United Food, 719 F.2d 760, 764 (5th Circ. 1983). Nor may federal jurisdiction be
22 based on an actual or anticipated defense or counterclaim. Louisville & Nashville
23 Railroad Co. v. Mottley, 211 U.S. at 152, Holmes Group, Inc. v. Vornado Air, 535 U.S.
24 826 (2002).

1 In this matter, the burden of establishing federal jurisdiction lies with the
2 Defendant. Wilson v. Republic Iron & Steel Co., 257 U.S. 92, 97, 42 S.Ct. 35, 37 (1921).
3 The United States Supreme Court has mandated that Courts apply strict scrutiny in
4 applying the removal statutes, as it has recognized Congressional intent to restrict
5 jurisdiction of federal courts. Powers at 762 (citing American Fire & Casualty Co. v
6 Finn, 341 U.S. 6, 10, 71 S.Ct. 534, 538 (1951)). Since the Defendant cannot assert
7 federal jurisdiction in their answer (if they had filed one) in the underlying court, nor in
8 their petition for removal, the only way in which they can invoke removal jurisdiction
9 would be to establish that the FNMA's complaint state a claim under federal law.
10

11 Here, the underlying complaint is a Forcible Entry and Detainer action. A
12 Forcible Entry and Detainer Action is state court summary statutory remedy for obtaining
13 possession of premises by the party entitled to actual possession. Gangadean v. Erickson,
14 17 Ariz. App. 131, 495 P.2d 1338 (1972). The object of an action under this section is to
15 afford a speedy and adequate remedy for obtaining possession of premises wrongfully
16 withheld. Olds Brothers Lumber Company v. Rushing, 64 Ariz. 199, 167 P.2d 394
17 (1946). Counterclaims, Cross-Complaints of offsets are not available in a Forcible Entry
18 and Detainer action; the only issue to be determined is the actual right to possession.
19 Gangadean, supra. In Curtis V. Morris, 186 Ariz. 534, 925 P.2d (Az. Supreme Ct. 1996),
20 the Supreme Court of Arizona ruled that a court may not determine the validity of title in
21 forcible detainer actions.
22

23 In his papers Kelder raises issues outside the scope of Plaintiff's complaint and
24 attempts to manufacture Federal Questions in an attempt to effect Removal. Forcible and

1 special detainer actions are state law issues and governed by A.R.S. §§ 12-1177, 12-1178,
2 and 12-1181. The new issues raised by Defendant are irrelevant to Plaintiff's state court
3 action. There is no Federal Question to be heard by this Court. It follows that the Court
4 should dismiss or remand.

5 **C. The District Court of Arizona, Tucson Division Lacks Jurisdiction**

6 In addition to the above, the Court should dismiss this case, because the Defendant
7 removed his case to the wrong division. Under 28 U.S.C. § 1441(a), "any civil action
8 brought in a State court of which the district courts of the United State have original
9 jurisdiction, may be removed by the defendant or the defendants, to the district court of
10 the United States for the district and division embracing the place where such action is
11 pending." Here, the original complaint was filed with the Maricopa County Superior
12 Court. Instead of complying with the requirements of section 1441(a) and filing a Notice
13 of Removal in the appropriate Phoenix division of the District Court, Defendants filed a
14 Notice of Removal with the Tucson division of the District Court of Arizona. Therefore,
15 Defendants matter should remanded to the lower court because this Court lacks
16 jurisdiction under 28 U.S.C. § 1441(a).
17

18 WHEREFORE for all the foregoing reasons, Plaintiff requests this Court to
19 remand this case accordingly.
20

21 DATED this 3rd day of May, 2011.

22 /s/ Kristin E. Mathers

23 Jason P. Sherman

24 Kristin E. Mathers

Attorneys for Plaintiff

1 Original of the foregoing e-filed this
2 3rd day of May, 2011:

3 U.S. District Court
4 District of Arizona-Tucson Division

5 Copy of the foregoing was mailed
6 on the above date to:

7 James Kelder
8 6207 E. Winchomb Drive
9 Scottsdale, Arizona 85254

10 Elizabeth Kelder
11 6207 E. Winchomb Drive
12 Scottsdale, Arizona 85254

13 Marshall Home
14 3051 W. Mexico Street
15 Tucson, Arizona 85746

16 By: /s/ Shannon K. Herron